Supreme Court of the United States

October Term, 1941

No. 1

[illegible]

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES

# BRIEF FOR THE PETITIONER

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1932.

No. 166.

JOHNSON & HIGGINS OF CALIFORNIA,
*Petitioner,*

*against*

THE UNITED STATES,
*Respondent.*

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES

## BRIEF FOR THE PETITIONER.

This case comes before the Court on writ of certiorari to the Court of Claims of the United States granted on October 10, 1932.

Jurisdiction of this Court is provided by 28 U. S. C. § 288 (a) and (b).

The opinion of the Court of Claims has not yet been reported.

### STATEMENT OF FACTS.

In December, 1918, the United States Army Transport "LOGAN" was on a voyage from San Francisco to Manila with general cargo consisting of supplies for the American Expeditionary Forces in Siberia, supplies for American troops in the Philippine Islands, supplies belonging to the Government of the Philippine Islands and supplies belonging to the American Red Cross, together

with a small amount of personal property of a commissioned officer and of a warrant officer of the United States Army. All of this cargo was being transported free of charge (R. 14).

The "LOGAN" was under the operation, management and control of the United States (R. 13).

During the voyage a serious fire broke out which imperilled ship and cargo and was extinguished with water by the crew. The vessel and some of the cargo was thus saved from destruction by the general average sacrifice. A portion of the cargo was damaged by the water with which the fire was extinguished. This is one of the commonest of general average cases. Some or all of the cargo aboard the United States Army Transport "LOGAN" at the time of the fire was covered by private insurance against general average losses (R. 13).

On August 22, 1922, the General Superintendent, Army Transport Service by Hugh Williams, Captain, Q. M. C., Administrative Officer, wrote Petitioner, a professional adjuster, with reference to preparing a general average statement, enclosing papers with reference to the fire mentioned above and requesting "that the necessary action be taken to prepare a statement of general average in order that the responsibility of the various parties concerned may be determined" (R. 13).

On August 28, 1922, Petitioner answered this communication, stating that "the preparation of the adjustment will receive our early attention" (R., 13).

Attached to respondent's letter to the Petitioner of August 22, 1922, was a letter from the Acting Judge Advocate General of the United States to the Quartermaster

General of the United States dated July 21, 1922, and having reference to the claim of the marine underwriters for contribution in general average, which letter stated, *inter alia,* as follows:

> "3. The claim being a valid one, it is therefore recommended that prompt steps be taken to ascertain the amount due the insurance company by way of contribution in general average. For this purpose it is recommended that the matter be referred to a general average adjuster. Such procedure appears to have been outlined in the 6th paragraph of the 3rd indorsement of September 22, 1919, from this officer to the Chief of Transportation Service, Purchase, Storage, and Traffic Division of the General Staff. While that recommendation was made for the purpose of ascertaining whether or not a question of general average was presented, that fact has now been determined and the same procedure is necessary in order to ascertain the amount due the insurance company, and the preparation of the general average statement.
>
> * * * * * * * *
>
> "For the Acting Judge Advocate General.
>
> "(s) SHERMAN MORELAND
> "SHERMAN MORELAND,
> "Colonel, Judge Advocate,
> "Chief, Administrative Law Division" (R. 13).

Pursuant to the instructions received in the letter of August 22, 1922, Petitioner made the necessary investigation concerning the fire, and prepared the usual general average statement. The Petitioner forwarded copies of this statement to the General Superintendent, United

States Army Transport Service, San Francisco, California (R. 14).

At the time the general average statement was sent by the Petitioner to the General Superintendent, United States Army Transport Service, at San Francisco, California, Petitioner also sent to the respondent a bill which included the following items:

| | |
|---|---|
| Plaintiff's charge for its services in the matter | $2,250.00 |
| Pillsbury & Curtis, for valuing vessel | 50.00 |
| Telegrams | 3.12 |
| Dakin Publishing Co., for printing general average statement | 62.00 |
| | $2,365.12 |

The charge of $2,250.00 is the usual, customary and reasonable charge of an average adjuster for services of this kind, and the disbursements set forth in the bill were actually made by the Petitioner (R. 14).

Thereafter, in May, 1928, the Comptroller General advised the Petitioner that its claim as set forth in the bill referred to in the preceding paragraph was disallowed, but that he would recommend to Congress an appropriation of $115.12 be made in payment of the claim. This was the amount of Petitioner's out of pocket disbursements (R. 14).

The Petitioner has received no payment of any kind for its services or disbursements.

### The Opinion of the Court of Claims.

In dismissing the Petition the Court of Claims held:—

1. That there was no general average involved in putting out the fire because there was no express contract

between the shipowner and the cargo owner which provided for general average.

2. That there could be no general average involved because the cargo was being carried by the LOGAN free of charge; that the payment of freight was a prerequisite to the creation of a general average situation.

3. That the Government had no interest in the statement of general average. (This holding was based upon the erroneous ground that the Government was not liable to contribute for the voluntary sacrifice of the cargo which saved the common venture and consequently that no one could have any authority from the Government to contract for a statement of general average in which the Government had no interest.)

4. That the Government was not obligated to pay for the general average statement which it received from the Petitioner and retained even though as owner of the LOGAN it was under the duty to have such a statement prepared.

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## QUESTIONS PRESENTED.

1. Whether the obligation to contribute, and the right to receive contribution, in general average, arises from a special contract or out of the general maritime law which requires that all interests benefited by a voluntary sacrifice in time of mutual peril, must contribute equitably to the cost of saving ship and cargo.

2. Whether the fact that the cargo was being carried without payment of freight changes the usual rule.

**3. Is the United States as the owner of a Public Vessel saved by a general average sacrifice excused from contributing in general average, in view of the fact that the United States has consented to be sued in cases "not sounding in tort?" 28 U. S. C. §250 (1).**

**4. Irrespective of the ultimate determination by this court as to the liability of the United States as the owner of a Public Vessel to contribute in general average, did the Administrative Officer of the Army Transport Service, charged with the duty of operating transports, lack authority to have a general average statement prepared, as would have been done by any prudent shipowner under like circumstances.**

## FIRST POINT.

THE OBLIGATION TO CONTRIBUTE IN GENERAL AVERAGE AND THE RIGHT TO RECEIVE GENERAL AVERAGE CONTRIBUTION IS A DOCTRINE OF EQUITY AND ARISES IRRESPECTIVE OF ANY CONTRACT.

### A: THE NATURE OF GENERAL AVERAGE CONTRIBUTION.

This Court concisely defined general average in the *Star of Hope,* 9 Wall. 203 (at page 228), as follows:

> "General average contribution is defined to be a contribution by all the parties in a sea adventure to make good the loss sustained by one of their number on account of sacrifices voluntarily made of part of the ship or cargo to save the residue and the lives of those on board from an impending peril, or for extraordinary expenses necessarily

incurred by one or more of the parties for the general benefit of all the interests embarked in the enterprise. * * *

"Common justice dictates that where two or more parties are engaged in the same sea risk, and one of them, in a moment of imminent peril, makes a sacrifice to avoid the impending danger or incurs extraordinary expenses to promote the general safety, the loss or expenses so incurred shall be assessed upon all in proportion to the share of each in the adventure.

"Where expenses are incurred or sacrifices made on account of the ship, freight, and cargo, by the owner of either, the owners of the other interests are bound to make contribution in the proportion of the value of their several interests, * * *."

* * * * *

"Such claims have their foundation in equity, and rest upon the doctrine that whatever is sacrificed for the common benefit of the associated interest shall be made good by all the interests which were exposed to the common peril and which were saved from the common danger by the sacrifice."

In the case of *Ralli* v. *Troop*, 157 U. S. 386 (at page 411), this Court said:

"In this country, when a ship is on fire, damage caused to goods in the hold by water, either poured down from above, or let in by scuttling the ship, by the master, or under his order or direction for the purpose of saving ship and cargo, has long been considered a subject of general average."

This is precisely the situation presented in the case at bar in which a portion of the cargo was damaged by

water with which the fire on the LOGAN was extinguished under the direction of the master, thus saving the ship and the balance of the cargo.

B: GENERAL AVERAGE DOES NOT DEPEND ON SPECIAL CONTRACT.

The obligation to contribute in general average and the right to receive general average contribution is not based upon any special contract or upon the payment of freight, but arises out of the general maritime law and is founded upon the doctrine of equity and policy that the interests sacrificed to protect the common venture should not bear the entire burden but that all the interests should share the loss or expense in equal proportion. The absence of a special contract is utterly immaterial.

In the leading case of *Ralli* v. *Troop*, 157 U. S. 386, 397, this Court said:

> "As the right to general average may be considered as resting not merely on implied contract between the parties to the common adventure, but rather on the established law of the sea, in the light of and subject to which all owners of ships and cargoes undertake maritime adventures * * *".

In *Charter Shipping Co.* v. *Bowring*, 281 U. S. 515, 517, Mr. Justice Stone in discussing liability to contribute in general average said (italics ours):

> "*As that liability arises not from contract but from participation in the common venture,* [citing] its extent in the absence of such limiting clauses, is under the admiralty rule, fixed by the law of the port of destination."

**The English authorities unanimously recognize that general average arises as a matter of equity and is in no sense dependent upon an express contract between the shipowner and cargo owner.**

In *Burton* v. *English*, 12 Q. B. D. 218, Brett L. J. said:

> "• • • I do not think that it [the right to contribute] forms any part of the contract to carry and that it does not arise from any contract at all, but from the old Rhodian laws, and has become incorporated into the law of England as the law of the ocean. It is not as a matter of contract, but in consequence of a common danger, where natural justice requires that all should contribute to indemnify for the loss of property which is sacrificed by one in order that the whole adventure may be saved."

To the same effect are:

*The Eagle*, 8 Wall. 15, 23;
*Hobson* v. *Lord*, 92 U. S. 397;
*Barnard* v. *Adams*, 10 How. 270, 303;
*Lowndes' General Average*, 6th Ed. p. 32;
*Duckworth on Marine Law*, 3rd Ed. p. 186;
*Arnould on Marine Insurance and General Average*, 11th Ed. Vol. II, section 908 note (g);
*Milburn* v. *Jamaica Fruit etc. Co.* (1900) 2 Q. B. 540, 550.

The decision of the Court of Claims was based on the assumption of that Court that as no freight was paid by the owners of the cargo and no special contract entered into between the cargo owners and the vessel owner, no duty was owed to cargo by the vessel. The fallacy of this position is at once apparent. It is directly contrary to the fundamental concept of general average.

In the case of a vessel carrying general cargo the several cargo owners owe one another no duty whatsoever, contractual or otherwise. No payment is made by one cargo owner to another. Yet these interests are obliged to contribute to one another in general average under the maritime law in the event of a sacrifice for the common benefit of ship and cargo. *Carver, Carriage of Goods by Sea,* 7th Ed. Section 364.

In *Swift & Company* v. *Glasgow Steam Shipping Company,* 280 Fed. 910 (S. D. N. Y. 1921), despite a bill of lading provision that the cargo was carried at the shipper's risk absolutely, the court held the cargo owner entitled to contribution in general average.

The obligations and rights under the law of general average are in no respect varied by reason of the common ownership of ship and cargo in which case obviously no freight is paid nor special contract involved. In the recent case of *Gulf Refining Company* v. *Universal Ins. Co.,* 32 F. (2d) 555 (1929), the Circuit Court of Appeals for the Second Circuit said on this subject:

> "It is authoritatively settled that general average depends upon the event of a common sacrifice for the benefit of all who are or may be interested in the voyage—not upon the existence of different contributory subjects. Contribution is a consequence. Neither the absence of a cargo nor the common ownership of vessel and cargo will affect the application of the principle of general average. *Potter* v. *Ocean Ins. Co.,* Fed. Cas. No. 11,335; *La Fonciere Compagnie* v. *Dollar,* 181 Fed. 945; *Risley* v. *Ins. Co. of North America,* 189 Fed. 529."

The same rule applies in England. See *Montgomery & Co.* v. *Indemnity Mutual Marine Ins. Company, Ltd.*

(1902) 1 K. B. 734, where it was held that even though ship and cargo both belonged to the same owner (no freight being paid) the law of contribution in general average still applies.

The practical aspect of this situation arises when different underwriters have insured a ship and cargo or one of them belonging to the same owner. In such cases it has never before been held that the underwriters were not entitled to receive general average contribution or were not obliged to contribute in general average to the same extent as if the ownership of vessel and cargo were separate and distinct. *Potter* v. *Ocean Ins. Co.*, Fed. Cas. No. 11,335; *Montgomery & Co.* v. *Indemnity Mutual Marine Ins. Co., Ltd.* (1902) 1 K. B. 734.

A specific example of the above situation is the case at bar, because a part of the cargo of the LOGAN was insured by the Atlantic Mutual Insurance Company. This underwriter now has an action pending in the United States Court of Claims to recover a general average contribution from the Government as owner of the LOGAN.

At the time of the average sacrifice involved here, a state of war existed between this country and Germany. The cargo aboard the LOGAN consisted chiefly of supplies for the American Army, supplies belonging to the American Red Cross and property of the Manila Railroad Company. That the army supplies were properly aboard the LOGAN can hardly be disputed. The transportation of supplies for the Red Cross by the United States without charge in time of war is specifically authorized by statute. *36 U. S. C. § 11**. That these Red Cross supplies were carried without payment of freight, pur-

*Appendix A, P. 25.

suant to statute, should not render them liable to sacrifice for the benefit of the vessel and other cargo without proportionate contribution from the other interests. Surely a shipowner owes no less duty to a cargo carried free by reason of statutory privilege than in the case of cargo on which freight has been paid. If this was not so the Master of the ship, instead of doing the best that the circumstances required, would be tempted to sacrifice property not owned by the United States. In fact any other holding in this case would result in penalizing cargo that the United States intended to benefit.

In the instant case a portion of the cargo was sacrificed in saving the common adventure. For this reason the decision of the Court of Claims holding that no general average situation exists operates in favor of the Government, which would otherwise be obliged to contribute in general average for the benefit of the cargo that was sacrificed. A contrary situation, however, is just as apt to arise where the sacrifice is made by the Government vessel. In such a case the rule announced by the court below would prevent the Government from recovering a general average contribution from the cargo. No reason is apparent for creating any such exception to the uniform rule of general average, which has received the sanction of this Court and those of England.

## SECOND POINT.

THE GOVERNMENT IS SUBJECT TO THE LAW OF GENERAL AVERAGE IN RESPECT TO PUBLIC VESSELS AND HAS CONSENTED TO BE SUED IN SUCH CASES.

The inherent liability of the United States for general average has long been recognized although at one

time the liability was incapable of enforcement either by suit directly against the Government or *in rem* against property in the hands of an officer of the United States. *The Davis,* 10 Wall. 15.

The former lack of remedy in cases of this nature has been removed and the United States has consented to suits against it for general average liability.

*28 U. S. C. § 250 (1)* reads as follows:

> "The Court of Claims shall have jurisdiction to hear and determine the following matters:
>
> "First. All claims * * * upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable * * *."

Suits for contribution in general average come squarely within the above definition. These claims do not sound in tort, *The Eagle,* 8 Wall. 15, and the claimant would be entitled to redress in a court of admiralty if the United States were suable.

In *The Western Maid,* 259 U. S. 419 this court denied the right to proceed *in rem* against a public vessel for collision. But the claim in that case, unlike the LOGAN, arose out of a tort and the United States had not consented to be sued in cases sounding in tort. The prohibition against recovery even in such cases was promptly removed by the Public Vessels Act 46 U. S. C. § 781 evidencing the policy of Congress to place the Government on the same plane as a private shipowner for torts.

In *United States* v. *Cornell Steamboat Co.,* 202 U. S. 184, a salvor salved certain goods on which the United

States Government had collected customs duties. If the goods had been destroyed, the Government, pursuant to statute, would have had to make a refund of the duties collected. The salvage of the goods permitted the United States to retain the customs duties. The salvors filed suit against the United States *in personam* in the District Court under the Tucker Act, to recover salvage. This Court allowed recovery and stated at page 190:—

> "A claim for salvage may undoubtedly be founded upon an express contract, but where the services are rendered, as in this case, without request of an officer of the Government, and particularly where they are incidental to services rendered in the saving of private property, we do not think that claim can be said to arise upon any contract, express or implied, with the Government of the United States. But the claim may properly be said to be one for unliquidated damages in a case 'not sounding in tort' in respect of which the party would be entitled to redress in a court of admiralty, if the United States were suable."

This case, it is true, involved salvage rather than general average. The basic liability in both situations, however, is identical. This has been recognized by a long line of cases.

*United States* v. *Wilder,* Fed. Cas. 16,694 (Mr. Justice Story);
*DuPont de Nemours* v. *Vance et al.* (1856) 19 How. 162, 171;
*The Siren* (1868) 7 Wall. 152, 160;
*The Davis,* 10 Wall. 15, 18, 19;
*The Lugano* (C. C. A. 5) 222 Fed. 230.

In *The Davis,* 10 Wall. 15, 19, this Court stated categorically that the United States was liable both for

salvage and for general average. The only bar to the enforcement of such liability, which had theretofore existed, was removed by the Tucker Act as recognized in the *Cornell* case, *supra*. In that case this Court cited with approval the case of *United States* v. *Wilder*, Fed. Cas. No. 16,694, in which Mr. Justice Story, sitting on circuit, held that the United States was liable for general average and pointed out that the nature of the liability in general average and in salvage is precisely the same. See also *Phillips on Insurance* (5th Ed.) p. 111.

The liability of the Government for general average contribution was recognized by the Court of Claims in *Brown's Case*, 15 C. Cl. 392. In that case a schooner with a cargo of Government stores aboard was voluntarily stranded to prevent her from being pounded to pieces on a shallow bar. The Court of Claims held the Government liable in general average for its proportion of the sacrifice, saying:

> " 'Such a claim is clearly within the rule, that whatever is sacrificed for the common benefit of the associated interests shall be made good by all the interests exposed to the common peril, and which was saved from the common danger by the sacrifice.' [citing]
>
> "This rule, it is now established, applies to the Government as well as to individuals. (*United States* v. *Wilder*, 3 Sumn. 309.) 'It rests' in the language of Mr. Justice Story, 'upon the ground of justice and equity' according to the maxim, 'qui sentit commodum, sentire debet et onus'."

On the same subject the following appears in *Arnould on Marine Insurance*, 10th Ed. Section 973, page 1248:

> "Goods belonging to government by the old laws did not contribute. Valin, however, thought they ought to do so; and Emerigon seems to have

> been of the same opinion. And it was held by Story, J. in the United States, after a most masterly examination of the principles of the supposed exemption that there was no ground for it either in law or practice, and that goods belonging to government are as liable to contribute as any other part of the cargo saved by the sacrifice. The practice among adjusters is to make them contribute."

The above cases recognize the principle that the Government is no less liable for general average contribution than a private individual and that the United States has consented to be sued in claims of this nature.

## THIRD POINT.

THE GOVERNMENT, AS OWNER OF THE LOGAN, WAS UNDER THE DUTY OF HAVING PREPARED AN ADJUSTMENT OF GENERAL AVERAGE.

It is an established principle of maritime law that the vessel owner is under a legal obligation to have a general average adjustment prepared. The reason for this is that the owner of the vessel and his agents are familiar with the facts and being in control are the only ones who can protect the various interests. This obligation is stated by this Court in the case of *Ralli* v. *Troop*, 157 U. S. 386, 400:

> "After a voluntary sacrifice of part of the adventure, and the consequent escape of the rest from imminent peril, the owner of the ship, or in his absence the master as his agent, has the duty of having an adjustment made of the general average * * *."

See also *The Beatrice* (S. D. N. Y. 1924) 36 F. (2d) 99; *The Santa Ana* (C. C. A. 9th) 154 Fed. 800.

In the case at bar the United States as owner of the LOGAN was obligated to have prepared an adjustment of general average under the above rule. Because of the intricate problems involved in the determination of general average contribution in modern voyages in which so many varied cargo interests are concerned the custom has grown up of engaging professional average adjusters who are familiar with the difficult problems of accounting concerned in these cases. This custom is judicially recognized by the courts. In *Emelia S. de Perez,* 22 F. (2d) 585, 586 (D. C. Md.) it was said:

> "From the very origin of general average it appears to have been the duty of the master, and representative of the shipowners, to make general average adjustments * * *. The custom has, to be sure, grown up of engaging adjusters for convenience' sake, who can familiarize themselves with and work out the rather difficult problems of accounting that are involved in many of these cases."

The employment of Petitioner for the preparation of an average statement was, therefore, proper and in furtherance of the duty imposed upon the Respondent as owner of the LOGAN.

## FOURTH POINT.

THE RESPONDENT IS LIABLE UNDER AN EXPRESS CONTRACT FOR THE VALUE OF PETITIONER'S SERVICES IN FURNISHING TO IT THE GENERAL AVERAGE STATEMENT.

The officer who ordered the general average statement from the Petitioner was expressly authorized by statute and regulation to enter into contracts of that general nature.

**It is provided in *10 U. S. C.* §72 that**

> **"The Quartermaster General, under the authority of the Secretary of War shall be charged with * * * the operation of utilities; * * * with the transportation of the army by land and water, including the transportation of troops and supplies by mechanical or animal means; with the furnishing of means of transportation of all classes and kinds required by the army; and with such other duties not otherwise assigned by law as the Secretary of War may prescribe * * *."**

Pursuant to this statute and under the authority of the Secretary of War, *United States Army Special Regulations No. 71**—*Army Transport Service* provide (Section 1, par. 1) that the Army Transport Service is organized as a special branch of the Quartermaster Corps for the purpose of transporting troops and supplies by water and that (Section 2, par. 8) included in the personnel of such organization there shall be a general superintendent at each home port *charged with the entire administration of the service, responsible for the operation of the vessels engaged therein and charged with the procuring and accounting for all services required* for and the maintenance of the transport service by such means as shall be in conformity with law.

That the courts will take judicial notice of the regulations of the executive departments of the Government has been frequently decided. *Thornton* v. *United States,* 271 U. S. 414; *Cosmos Exploration Company* v. *Gray Eagle Company,* 190 U. S. 301; *Caha* v. *United States,* 152 U. S. 211.

Petitioner's instructions to prepare a general average statement came in writing from the General Superinten-

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* Appendix B, P. 26.

dent and administrative officer of the Army Transport Service at San Francisco, the LOGAN's home port (R. 10, 13 and 15). It would be difficult to conceive of a more definite and express authorization for the act of an officer of the Government than that involved in this case.

In communicating with the Petitioner, Captain Williams enclosed a copy of the memorandum of the Judge Advocate General recommending to the Quartermaster General the reference of the matter to an average adjuster. While the recommendation of the Judge Advocate General could not create authority if none existed, it is at least strong evidence upon which an inference of authority may fairly be based, and nothing to rebut this inference appears in the record. The very fact that Captain Williams had the custody of the army file concerning the LOGAN fire is in itself evidence of his authority to deal in respect thereto.

Petitioner contends that not only did the General Superintendent of the Army Transport Service have authority, but that he had the duty as well, of having a general average statement prepared which would properly reflect the rights and liabilities of all concerned growing out of the general average sacrifice.

This contention is based upon what we submit is the clear liability of the United States to contribute in general average to sacrifices made in saving a Public Vessel.

If, however, this Court should ultimately hold that the United States is not liable to make a general average contribution in respect to a Public Vessel, the responsibility of the Government to pay for the general average statement would not be affected.

Going back to the situation as it existed at the time when this general average statement was ordered to be prepared, we find that a substantial claim had been made by the cargo against the United States for a con-

tribution. The Judge Advocate General of the Army had advised the Quartermaster General that the claim was a valid one and that the matter be referred to an average adjuster (R. 13). There was no decision of this or any other Court holding that the United States was not liable for general average contribution in respect to a Public Vessel.

At that time it certainly could not be said that it was clear the United States would not be held liable for the general average contribution. A final judicial decision in the matter was many years off. In view of the opinion of the Judge Advocate General, the General Superintendent had every reason to believe that an average statement would be required. In the meantime, if a proper investigation was not made, the details respecting the origin and character of the fire, the value of the ship and the various lots of cargo, and the extent of the cargo burned and damaged, would most certainly have been lost.

In the interest of protecting the United States, should it ultimately be held liable for the general average contribution in respect to the LOGAN, it was the duty of the General Superintendent of the Army Transport Service to do everything that a prudent man would do to protect the interests of the United States, and certainly in the light of the situation as it then existed, it was not only within the authority, but it was the duty of that officer as well, to have a general average statement prepared so that all the details in respect to the fire and the sacrifices might be preserved against the day when the question of ultimate liability should be determined by the courts.

What the General Superintendent of the Army Transport Service did here was only what any prudent ship-

owner would do in order to minimize a loss following a disaster, so that if ultimate liability was found on the merits, the damages could be kept to the minimum.

If this Court should ultimately find that the United States is liable for the general average contribution, the War Department has in its possession a full and adequate statement of the losses and the rights and liabilities of all concerned. If it did not have such a statement in its possession and the decision should be that the United States was liable for the average contribution, the delay and expense of collecting the data after all these years would be excessive as compared with the trifling sum that the Petitioner charged for its services in making the investigation when the facts were readily available.

The acts of the General Superintendent in contracting for Petitioner's services were in furtherance of his general duties as administrative officer of the Army Transport Service responsible for the operations of the vessels of that service. The powers conferred on him by statute and army regulations were broad, and some latitude of discretion must be allowed him. In the case of *Belcher* v. *Linn*, 24 How. 508, 522 this Court said:

> "The exercise of these powers involves knowledge, judgment, and discretion. We hold, as was held in that case, that when power or jurisdiction is delegated to any public officer or tribunal over the subject matter, and its exercise is confided to his or their discretion, the acts so done are in general binding and valid as to the subject matter."

The Petitioner dealt with the proper officer authorized to handle matters of this general nature and is entitled to compensation for its services, irrespective of

ultimate determination of the courts as to the operation of the laws of general average in situations such as that presented on the LOGAN.

In such a situation the court should reaffirm the principles recognized in its earlier cases, that

> "The courts will assume that an officer, in the performance of an official act, not only took all necessary preliminary steps required but acted within the circumference of his authority. There is a presumption in favor of the legality of his official act (*United States* v. *Coe*, 170 U. S. 681, 697), which must be overcome by satisfactory proof that the officer exceeded his powers (*Fouvergne* v. *United States*, 18 How. 470), and the court has found that there is not satisfactory proof of want of authority upon the part of the officers making the refunds in this case." *Lamport Mfg. Supply Co.* v. *United States*, 65 C. Cls. 579 at 610; *United States* v. *Arredondo*, 6 Pet. 691, 727-729; *Bartlett* v. *King*, 16 How. 263, 272; *United States* v. *Delaney*, 164 U. S. 282; *Holton* v. *United States*, 15 C. Cls. 276.

The exchange of letters between the General Superintendent of the Army Transport Service and the Petitioner constitutes a sufficient contract in writing under the provisions of *41 U. S. C. § 16* and *10 U. S. C. § 1221*. *American Smelting Company* v. *United States*, 259 U. S. 75; *United States* v. *Swift & Co.*, 270 U. S. 124.

Even if it be held that on the record of this case it does not appear that the General Superintendent had authority, express or implied, to order the preparation of such a general average statement, it is clear that under the decisions of this Court the Petitioner is entitled

to recover the fair value of its services in preparing the adjustment of general average at the request of a Government officer having at least colorable authority.

As owner of the LOGAN, the United States was under the duty of having prepared a general average statement. *Ralli* v. *Troop,* 157 U. S. 386, 400. The statement prepared by the Petitioner was delivered to and retained by the Government (R. 14).

It has been held by this Court that although a contract under which services were rendered to the United States may be void, one who renders those services may be entitled to recover their fair value.

In the case of *Clark* v. *United States,* 95 U. S. 539, 543, where the Government used a vessel of the claimant under a contract that was void by reason of not being in accordance with the controlling statute, this Court held that the claimant was entitled to the value of the use of the vessel during the time that it was in the hands of the Government agents.

In the case of *Crocker* v. *United States,* 240 U. S. 74, 81, this Court held that although no recovery could be had upon a contract with the Postmaster General because it was tainted with fraud and rescinded by him on that ground, nevertheless the claimant was entitled to a recovery upon *quantum valebat.*

It is apparent that under the above decisions, even if the Administrative Officer of the Army Transport Service were without authority to order this adjustment of general average (and Petitioner strongly urges that the authority of this officer is established), the Petitioner is entitled to recover its fair value upon implied contract for *quantum meruit.*

## CONCLUSION.

THE DECISION OF THE COURT OF CLAIMS SHOULD BE REVERSED AND JUDGMENT ENTERED FOR THE PETITIONER IN THE SUM OF $2,365.12, WITH COSTS.

Respectfully submitted,

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STAUNTON WILLIAMS,
RICHARD L. SULLIVAN,
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## APPENDIX A.

*36 U. S. C.*

§11. "Transportation and subsistence. When the Red Cross co-operation and assistance with the land and naval forces in time of war or threatened hostilities shall have been accepted by the President, the personnel entering upon the duty specified in section 10 of this title shall, while proceeding to their place of duty, while serving thereat, and while returning therefrom, be transported and subsisted at the cost and charge of the United States as civilian employees employed with the said forces, and the Red Cross supplies that may be tendered as a gift and accepted for use in the sanitary service shall be transported at the cost and charge of the United States."

## APPENDIX B.

**United States Army**
**Special Regulations No. 71**
**Army Transport Service**
**By Order of the Secretary of War**

### Section I.

*Organization.*

1. The Army Transport Service is organized as a special branch of the Quartermaster Corps, United States Army, for the purpose of transporting troops and supplies by water.

• • • •

4*a*. The general organization of the personnel for each home port will be as follows, subject to such reduction as may be practicable.

(1) General superintendent.

• • • • • •

### Section II.

*General Duties of Officers.*

8. *General Superintendent.—a.* Under peace conditions to be an officer of the Quartermaster Corps, with headquarters at the home port, and charged with the entire administration of the service, pursuant to its regulations and the requirements of law, except such matters as relate to the Medical Department. The general superintendent will, under peace conditions, receive his general instructions from the Quartermaster General, and all orders, excepting such as relate to the Medical Department, relative to the service will be made to and through him. He will be responsible for the efficient and economical administration of the service and the maintenance and

operation of the vessels engaged therein; for the accountability and disbursement of all funds furnished for the operation of the Transport Service except as otherwise directed; for the management and security of all property and for satisfactory service of all the officers and employees under his direction; for the assignment of authorized passengers to staterooms upon all transports leaving the home port; he will be charged under the provisions of law and Regulations of the Army Transport Service with the procuring and accounting for all services and supplies, except such as pertain to the Medical Department, required for the establishment and satisfactory maintenance of the service by such means as shall be in conformity with the law and be most advantageous and economical to the Government.

*b.* Under war conditions, where ports of embarkation have been established, the general superintendent will be an officer of the Quartermaster Corps on the staff of the commander of the port of embarkation, under whom he is charged with the entire administration of the Transport Service, pursuant to its regulations and the requirements of law, except such matters as relate to the Medical Department.